

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2717

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PATRICIA A. LEIDER,

Plaintiff-Respondent,

v.

**LABOR AND INDUSTRY REVIEW
COMMISSION,**

Defendant-Appellant,

SHEBOYGAN COUNTY,

Defendant.

APPEAL from an order of the circuit court for Manitowoc County:
FRED H. HAZLEWOOD, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

SNYDER, J. The Labor and Industry Review Commission
(LIRC) appeals from a circuit court order reversing its denial of § 102.61(1),

STATS.,¹ vocational rehabilitation travel expenses and maintenance costs to Patricia A. Leider and remanding the matter to LIRC to determine if Leider had compensable work injuries. Because LIRC's denial of § 102.61 benefits was premature and because its appeal seeks, in part, an advisory opinion on the merits of Leider's pending compensation claim, we affirm the circuit court's order.

Leider worked for the Rocky Knoll Health Care Center, a Sheboygan County facility, as a nurse's aide from June 22, 1987, until December 3, 1991, when she was laid off for what Rocky Knoll described as "a non-work related medical problem." While assisting patients at Rocky Knoll, she injured her shoulder on April 9, 1991, and sustained a low back injury on August 9, 1991. She was paid temporary total and temporary partial disability benefits intermittently from April 24, 1991, through November 25, 1991.

¹ All references are to the 1991-92 edition of the Wisconsin Statutes. Section 102.61(1), STATS., has since been amended by 1993 Wis. Act 370, § 4.

Section 102.61(1), STATS., 1991-92, reads as follows:

An employe who is entitled to receive and has received compensation under this chapter, and who is entitled to and is receiving instructions under the vocational rehabilitation act, and amendments thereto, P.L. 78-113, as administered by the state in which the employe resides or in which the employe resided at the time of becoming physically handicapped, shall, in addition to other indemnity, be paid the actual and necessary expenses of travel and, if the employe receives instructions elsewhere than at the place of residence, the actual and necessary costs of maintenance, during rehabilitation, subject to the following conditions and limitations

Leider applied for Division of Vocational Rehabilitation (DVR) assistance on October 17, 1991, prior to being laid off by Rocky Knoll, "hoping they could help me find a job."² DVR counselor Dean Loudon certified Leider for § 47.02, STATS., vocational rehabilitation training and she enrolled in an accountant assistant's course at Moraine Park Technical Institute (MPTI).³ She then filed the § 102.61, STATS., claim with LIRC that is the basis of this appeal.

Under § 102.61, STATS., when an employee is entitled to and receives ch. 102, STATS., compensation from the Department of Industry, Labor and Human Relations (DILHR),⁴ and in addition is entitled to and receives vocational rehabilitation services from the Department of Health and Social Services (DHSS), the employer must pay the employee's travel expenses and maintenance costs if the services are provided away from the employee's home. *Dane County Hosp. & Home v. LIRC*, 125 Wis.2d 308, 319, 371 N.W.2d 815, 822 (Ct. App. 1985).

On January 7, 1993, LIRC Administrative Law Judge (ALJ) Neil L. Krueger denied Leider's § 102.61, STATS., claim, finding that DVR had erroneously exercised its discretion in certifying Leider for vocational

² DVR determines a claimant's rights to vocational rehabilitation independent of worker's compensation benefits and provides for tuition and book costs from government funds. See § 47.02(1), (3)(f), STATS.

³ We are unable to determine the exact date that DVR certified Leider for the accountant assistant's course. The record indicates that Leider's temporary disability ended on November 25, 1991, and that her MPTI course started in August 1992, approximately nine months later.

⁴ LIRC is a DILHR agency. DVR is the operative agency of DHSS in this matter.

rehabilitation training.⁵ LIRC affirmed Krueger's decision. Leider appealed and the circuit court held that in applying § 102.61(1), STATS., to Leider's claim, "The important fact is [LIRC] has not determined whether [Leider's] disability is compensable." The circuit court reversed and remanded for LIRC to make that threshold determination.

To resolve this issue, we must interpret § 102.61(1), STATS. The interpretation of a statute is a question of law which we review de novo. *DOR v. Milwaukee Brewers Baseball Club*, 111 Wis.2d 571, 577, 331 N.W.2d 383, 386 (1983). We first consider the plain language of the statute to determine whether its intent is clear on its face. *Voss v. City of Middleton*, 162 Wis.2d 737, 749, 470 N.W.2d 625, 629 (1991).

Section 102.61(1), STATS., provides that a claimant must be "[a]n employe who is entitled to receive and has received compensation under [the worker's compensation] chapter" in order to claim benefits. We read the statute to clearly require Rocky Knoll to be obligated to pay ch. 102, STATS., compensation before it can be required to pay vocational rehabilitation benefits. Such has not been established in this record. Not applying a statutory requirement renders the requirement superfluous, a result we must avoid.

⁵ DILHR's limited powers of review over DVR certification for vocational rehabilitation services includes whether DVR has applied an interpretation of the rehabilitation laws which is entirely outside the reasonable scope of interpretation and hence a clear abuse of administrative power. See *Massachusetts Bonding & Ins. Co. v. Industrial Comm'n*, 275 Wis. 505, 512, 82 N.W.2d 191, 195 (1957). In *Massachusetts Bonding*, however, the supreme court stated that "[i]t is clear that [the claimant] was entitled to workmen's compensation and received it" *Id.* at 510, 82 N.W.2d at 193. No clear determination of Leider's entitlement to worker's compensation has been made by LIRC in this case.

Village of Menomonee Falls v. Michelson, 104 Wis.2d 137, 151, 311 N.W.2d 658, 665 (Ct. App. 1981).

We requested additional briefing on whether this appellate issue was properly before us prior to Leider's compensation claim being resolved. LIRC responded that it was not necessary for it to determine whether Leider's disability was compensable as a prerequisite to disposing of the § 102.61, STATS., claim, and that the parties entered into an agreement before Krueger that deferred the issue of worker's compensation "until possible future hearing(s)." LIRC also "submitted that the Commission did find that [Leider's] work injuries did not result in permanent disability requiring retraining."⁶ We are not persuaded that LIRC's reasoning assuages the need to specifically address the statutory requirement.⁷

The record supports that Leider's entitlement to ch. 102, STATS., compensation was unresolved at the time of the § 102.61, STATS., hearing.

First, the parties agreed that Leider was not receiving worker's compensation on the day of the § 102.61 hearing and that the sole issue was her vocational rehabilitation benefits claim:

⁶ LIRC argues that Krueger's finding that "'it is extremely questionable that the work injuries ... resulted in any permanent functional disability' (emphasis supplied) is a sufficient finding that the Commission had a legitimate doubt that [Leider] failed to prove such permanent restrictions, necessitating training." It was LIRC's responsibility to resolve the question and remove the doubt.

⁷ In essence, we are deciding an appellate issue that is dependent upon an enabling entitlement that is yet to be determined by LIRC. We are at a loss to determine why LIRC did not hold the § 102.61, STATS., claim in abeyance until such time as it determined Leider's disability compensation status. At a time of overburdened court agendas and agency budget reductions, we question the merits of this procedure.

[JUDGE KRUEGER]:Okay. The Respondent has paid temporary total and temporary partial disability intermittently from April 24, 1991 through November 25, 1991 totaling \$1,415.32. No permanent disability has been paid.

The sole issue at today's hearing is vocational rehabilitation benefits; with Applicant claiming benefits commencing on August 26, 1992, and am I correct in assuming that she's still retraining at this time?

....

... [I]s everything I have said an accurate and complete statement of the matters conceded and issues in dispute?

MR. LAWRENCE:Yes, sir.
[Leider's counsel]

[JUDGE KRUEGER]:Thank you. Mr. Zodrow?

MR. ZODROW:That's right; yes.
[Rocky Knoll's
counsel]

While the parties are free to agree to a LIRC determination of a derivative issue prior to LIRC deciding the enabling issue of compensation coverage, they are not entitled to seek an advisory appellate review of that determination. We are not required to address an appellate issue structured by

a party. See *State v. Waste Management of Wis., Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977).

Second, it is evident from Krueger's findings, adopted by LIRC, that Leider's entitlement to worker's compensation was unresolved: [I]t is extremely questionable that the work injuries of April 24, 1991 and August 9, 1991 resulted in any permanent functional disability.

....

... This is not a finding regarding any claims for additional temporary disability, permanent disability, loss of earning capacity or medical expenses arising out of these two injury dates. It is ... merely a finding regarding the responsibility of Rocky Knoll Health Care Center to pay Vocational Rehabilitation Benefits.

Third, Krueger entered the following order: That the application of Patricia Leider for benefits under sec. 102.61 of the Worker's Compensation Act be dismissed. The Department shall retain jurisdiction as to all other issues.

Krueger disassociated Leider's travel and maintenance claim from LIRC's unresolved ch. 102, STATS., compensation determination and further suggested that she would likely not prevail with her compensation claim.

Neither party contends that it stipulated to Leider's entitlement to ch. 102, STATS., compensation. To the contrary, consistent with Krueger's reservations, LIRC also questioned Leider's ultimate entitlement in its memorandum opinion:

Furthermore, [Leider's] treating physician for her injury in 1988, as well as her injuries in April and August, 1991, Dr. Livermore, opined that [Leider's] disability subsequent to August, 1991, was not caused by her most recent work injuries. Dr. Livermore opined in a letter dated November 18, 1991, that it was his belief that the applicant's long-term disability was based on her physiologic musculoskeletal status, rather than any significant injury sustained while working for the employer. Dr. Livermore also opined that the applicant's most recent work injury on August 9, 1991, had not aggravated or accelerated the progression of her underlying condition beyond its normal progression, and that no permanent disability had resulted. The administrative law judge credited Dr. Livermore's opinion. The commission has found nothing in the record to warrant overturning the administrative law judge's credibility assessment. Therefore, it was not established that the applicant's disability which required retraining was caused by the injury she sustained while working for the employer.

LIRC's last sentence above acknowledges the proper statutory order of events: "[I]t was not established that the applicant's disability *which required retraining* was caused by the injury she sustained while working for the employer." (Emphasis added.) It is LIRC's failure to decide whether Leider has, in fact, established her entitlement to ch. 102, STATS., compensation that precludes a judicial determination of her entitlement to § 102.61, STATS., benefits. LIRC has no business deciding the merits of DVR's actions until it has completed its own threshold determination regarding ch. 102 compensation.

We are compelled to conclude by stating that we are extremely troubled by LIRC's reliance in this appeal on Leider's unresolved ch. 102, STATS.,

compensation claim being “extremely questionable” and that there is a “legitimate doubt” that she will receive compensation from Rocky Knoll. That question and doubt are solely within LIRC's authority and must be resolved by LIRC without comment or input from this court.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.